No. 73-1573

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

Appellants,

vs.

DUANE LARKIN, M.D.,

Appellee.

On Appeal from the United States District Court for the Eastern District of Wisconsin.

SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Appellants,

vs.

DUANE LARKIN, M.D.,

Appellee.

On Appeal from the United States District Court for the Eastern District of Wisconsin.

SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellee, Dr. Duane Larkin, by his attorney, Robert H. Friebert, hereby suggests to the Court that the appeal in the above captioned case is moot, or, in the alternative, the appellee moves for reconsideration of his Motion to Dismiss or Affirm. Said motion is based upon the fact that the District Court on July 24, 1974, initially in response to a motion of the appellants and ultimately in re-

sponse to a cross motion by the appellee modified their judgment to state the following:

> "IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18(7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success."

In support of this suggestion of mootness and motion, the appellee submits the following documents:

1. The defendants' Notice of Motion to Modify Injunction dated July 3, 1974;
2. The defendants' Motion to Modify Injunction dated July 3, 1974;
3. The affidavit on behalf of the defendants in support of the Motion to Modify Injunction dated July 2, 1974;
4. The Brief of the defendants in support of Motion to Modify Injunction;
5. The plaintiff's Motion to Modify Injunction dated July 5, 1974;
6. The plaintiff's Brief in Support of Motion to Modify Injunction;
7. The defendants' Reply Brief in Support of Motion to Modify Injunction dated July 10, 1974;
8. The Order of the Court dated July 24, 1974;
9. The Modified Judgment of the Court dated July 25, 1974.

Dated at Milwaukee, Wisconsin this 26th day of July, 1974.

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(414) 271-0130

/s/ Robert H. Friebert
Robert H. Friebert

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

NOTICE OF MOTION

TO: Robert H. Friebert
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorney for Plaintiff

PLEASE TAKE NOTICE that the defendants will bring the attached Motion to Modify Injunction on for hearing before the court in the courthouse in Milwaukee at such date and time as shall be set by the court.

Dated at Madison, Wisconsin, this 3rd day of July, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin
/s/ Le Roy L. Dalton
Le Roy L. Dalton
Assistant Attorney General
Attorneys for Defendants

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

MOTION TO MODIFY INJUNCTION

TO: The Honorable Myron L. Gordon
United States District Judge
Federal Building
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

COME NOW the defendants, by their attorneys, Robert W. Warren, Attorney General of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of Wisconsin, and move the court under the authority of Rule 62 (c) of the Federal Rules of Civil Procedure to modify the temporary injunction entered by judgment on January 31, 1974, so that the last phrase of said judgment reads as follows:

"* * * that the defendants are preliminarily enjoined until further notice from utilizing the provisions of

§448.18 (7), Wis. Stats., against the plaintiff Duane Larkin, M.D."

Dated at Madison, Wisconsin, this 3rd day of July, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin
/s/ *Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General
Attorneys for Defendants

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY INJUNCTION

STATE OF WISCONSIN)
) SS.
COUNTY OF WOOD)

John W. Rupel, M.D., being first duly sworn, on oath deposes and says:

(1) That he is the chairman of the Medical Examining Board of the State of Wisconsin and is one of the defendants herein.

(2) That he has supervision of the business and affairs of the Medical Examining Board and is familiar with the files of said Board.

(3) That since the three-judge court gave its oral decision on November 19, 1973, the Medical Examining Board

has not used the authority of sec. 448.18 (7), Wis. Stats., for the purpose of imposing discipline upon Duane Larkin, M.D., and has not used said statute to discipline any other licensed physician because of the finding by the court and its judgment that said statutory provision is unconstitutional.

(4) That since the oral decision of the court on November 19, 1973, the Medical Examining Board has changed its investigative procedures so that each new case is assigned to one member of the Board to investigate, thereby leaving the remainder of the Board free of any involvement in the investigative process. That the Board has been advised by counsel that it is the opinion of counsel that such separation of functions would permit the remainder of the Board to consider any adjudicatory questions involved in the case without violating the due process rights of any licensee under investigation.

That, however, becauseof the preliminary injunction set out in the judgment enjoining the Board from utilizing the provisions of sec. 448.18 (7), Wis. Stats., the Board has been deprived of a valuable tool in carrying out its supervisory functions in connection with persons licensed to practice medicine in the State of Wisconsin. That if said preliminary injunction applied only to Duane Larkin, M.D., the Board could use the statute in question in appropriate cases where suspension might be justified in order to protect the public interest, especially where the physician involved is having problems with drugs or alcohol, and revocation of the license by action through the office of the district attorney would not be necessary or desirable in the program of rehabilitation of the licensed physician.

(5) That there are pending at this time before the Board three cases where suspension might be appropriate

rather than the more drastic remedy of seeking revocation. In the first case, a podiatrist is apparently the victim of a drug habit and the Board feels that the most appropriate course of action would be to temporarily suspend the doctor's license, thereby cutting off the source of the drugs which he has been obtaining by writing prescriptions for himself, and thereby initiate a program of rehabilitation rather than initiating the more drastic remedy of revocation of the license by an action brought by the district attorney.

(6) That the second case that the Board presently is dealing with, where immediate suspension should be used to protect the public interest, involves alcoholism and failure to diagnose diabetes, emphysema, and arteriosclerotic heart disease. After the local medical society failed in their attempts to have the physician cooperate by receiving medical treatment, his membership in the local society was suspended and the matter referred to the Medical Examining Board. Here again, suspension and proper treatment to rehabilitate the doctor to be a useful member of the medical profession would be the preferable remedy for the Board to use in the interests of protecting the patients and potential patients of this physician rather than resorting to the difficult procedure of revocation where the Board loses its ability to help the physician to become rehabilitated.

(7) The third case presently before the Board, where suspension and rehabilitation appear to be appropriate, involves a physician who is apparently indulging in the drug habit. Again, the Board feels that suspension and rehabilitation of the physician would not only be in the public interest but would also provide an opportunity for the Board to save the professional career of the physician.

(8) This affidavit is made in support of a motion to modify the temporary injunction entered by the court so that it applies only to the plaintiff.

Dated at Marshfield, Wisconsin, this 2nd day of July, 1974.

/s/ John W. Rupel, M.D.
John W. Rupel, M.D.

Subscribed and sworn to before me this 2nd day of July, 1974.

Dorothy Ann Snyder
Notary Public,
Wood County, Wisconsin
My commission 7-31-77

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION TO MODIFY INJUNCTION

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought under the Civil Rights Act. The three-judge district court temporarily enjoined the Medical Examining Board from enforcing sec. 448.18 (7), Wis. Stats., after a hearing on November 19, 1973. Subsequently a written decision was filed on December 21, 1973, and judgment finding sec. 448.18 (7) unconstitutional and ordering "* * * that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats."

The defendants took an appeal from that temporary injunction to the United States Supreme Court and on June

10, 1974, the Supreme Court noted probable jurisdiction. The case is now being briefed and will be set for oral argument late in the year with a decision expected by early 1975.

In the meantime, the Medical Examining Board continues to be enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats.

STATUTORY PROVISIONS

Federal Rule of Civil Procedure 62 (c):

> "Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

ARGUMENT

I. Court Should Modify Preliminary Injunction.

In its decision and also in the judgment the court has held sec. 448.18 (7), Wis. Stats., unconstitutional and has in the judgment prohibited the defendants from further use of the provisions of sec. 448.18 (7), Wis. Stats. Thus, the Medical Examining Board has been thwarted in the use of the above statute in cases where its use could be of considerable value in protecting the interests of the people of the State of Wisconsin who receive medical services from

licensed physicians and at the same time allow the Board to use the suspension device for rehabilitation of licensed physicians who have stepped out of line.

The affidavit of Dr. John W. Rupel attached to the motion indicates that the Medical Examining Board is operating under procedures at this time which do not result in the mixing of investigative and adjudicative functions in the same person or persons. It is possible, therefore, to use the suspension statute without violating procedural due process of a licensee. The *Larkin* case was, of course, on its facts unique in that the Board investigated charges and then proposed to hold a contested hearing on those charges. Under their present operating procedure the person who supervised the investigation would not be a part of the adjudicative decision and therefore the most important shortcoming cited in the *Larkin* case would not be present.

II. The Court Should Not Have Declared The Statute Unconstitutional.

A three-judge court on a mere motion for a preliminary injunction lacks authority to declare a state statute unconstitutional. The United States Supreme Court unanimously so held in *Mayo* v. *Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774. In reversing the judgment therein, the court, after pointing out that the lower court had declared a state statute unconstitutional, wrote (309 U.S. at 316):

> "We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."

It is obvious that the judgment in connection with the preliminary injunction should relate solely to the plaintiff Larkin and that the declaration of unconstitutionality of the statute involved was premature and should now be corrected.

III. Preliminary Injunction Should Be Stayed As To All But Plaintiff.

The defendants have no objection that the preliminary injunction stays in effect as to Dr. Larkin. However, Dr. Rupel's affidavit clearly shows that irreparable injury is resulting to the state and its citizens by the denial of the use of sec. 448.18 (7), Wis. Stats., in appropriate cases where no mixing of functions takes place.

CONCLUSION

It is respectfully concluded that the court should modify the judgment entered on January 31, 1974, so that the defendants are preliminarily enjoined from utilizing sec. 448.18 (7), Wis. Stats., against only the plaintiff Duane Larkin, M.D.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin
/s/ *Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General
Attorneys for Defendants
P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

MOTION TO MODIFY INJUNCTION

The plaintiff Duane Larkin, M.D. by his attorney Robert H. Friebert hereby moves the Court for the entry of an order modifying the preliminary injunction and judgment dated January 31, 1974 to state the following:

> "It is ordered and adjudged that the defendants are preliminarily enjoined until further notice from utilizing the provisions of Sec. 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer immediate and irreparable injury, loss and damage if this statute were to be applied against him in that he would be deprived of his right to practice medicine and his reputation in the community would be irreparably injured, and the defendants would not in any way be prejudiced and, further on the grounds that the plaintiff's challenge to the constitutionality of Sec. 448.18 (7), Wis. Stats. has a high likelihood of success in this case."

Dated at Milwaukee, Wisconsin this 5th day of July, 1974.

P.O. Address:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

/s/ Robert H. Friebert
Robert H. Friebert

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION

The defendants have moved to modify the injunction in the above captioned case dated January 31, 1974. The plaintiff has no objection to modifying this judgment, but believes that the changes should be more inclusive than that proposed by the defendants.

As the Court is aware, the United States Supreme Court has noted probable jurisdiction in this case. The defendants herein, claim, *inter alia,* that this Court's decision and injunction was improper because it declared the statute unconstitutional at a preliminary hearing stage and, further because this Court made no specific finding of irreparable injury. The motion to dismiss or affirm, filed by the plaintiff in the United States Supreme Court stated, *inter alia,* that these objections on their part were hypertechnical and that if the defendants felt that they were harmed they were free to petition the Court for clarification.

Now that they have so petitioned the Court, we believe that the decision of the Court ought to be amended to avoid

all of their hypertechnical objections and therefore propose the amendment as contained in the motion.

The affidavit and brief in support of the motion of the defendants is very interesting. They note that the Board has established a new procedure whereby one member investigates and the other members will decide the case. However, it is clear from these documents that the Board has already made up its mind with respect to the results of the inquiry involving those three other persons because Dr. Rupel's affidavit at Paragraphs (5), (6) and (7) indicates the decision of the Board. Furthermore, it is clear that the Board is extremely solicitous with respect to a doctor and a podiatrist who are addicted to drugs and with respect to a doctor who is an alcoholic and is unable to properly diagnose diseases. The Board in those instances is interested in rehabilitation and presumably interested in preventing notoriety as part of the rehabilitation program since it appears that it would be difficult to save these persons if their various drug habits became public information. On the other hand, the Board was not as solicitous in "rehabilitating" Dr. Larkin for the "heinous" alleged activities of using a false name, fee splitting, etc. Apparently, a nonaddicted, nonalcoholic physician who administers abortions is beyond rehabilitation.

In any event, we have no objection to amending the judgment as outlined in the plaintiff's motion. However, we do object to the partial amendment as contained in the defendants' motion.

Dated at Milwaukee, Wisconsin this 5th day of July, 1974.

/s/ Robert H. Friebert
Robert H. Friebert

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO MODIFY INJUNCTION

In response to the motion filed by the defendants requesting the court to modify the preliminary injunction and judgment dated January 31, 1974, the plaintiff has also filed a motion to modify the injunction, apparently agreeing with the proposal submitted by the defendants but in addition requesting that the modified judgment specify various grounds not previously included in the judgment.

The defendants have specified by affidavit and brief in support of motion the reasons why they are requesting the court to modify the injunction so that it applies only to the use of sec. 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D. These reasons include the fact that the Medical Examining Board has cases where it would be more appropriate to consider a suspension of the physician's license rather than to seek its permanent revocation. It is clearly set out that the Board has been hampered in its statutory duties by not being able to use sec. 448.18 (7), Wis. Stats., against licensees in appropriate circumstances.

Apparently plaintiff does not object to the modification of the injunction so as to permit the Board to use the statute in question in its overall supervision of the licensed medical profession.

The plaintiff, however, thinks this would be a good time to get rid of what are termed "hypertechnical objections" which are now present in the case pending before the United States Supreme Court. Plaintiff therefore suggests the additional language found in his motion dealing with irreparable injury to reputation and that plaintiff's challenge to the constitutionality of the statute in question has a high likelihood of success.

The plaintiff is obviously, by suggesting this addition to the judgment, attempting to obviate several issues which are presently pending in the United States Supreme Court. It is the defendants' position that these issues should be resolved in the United States Supreme Court and that this court should merely modify the injunction to permit use of the statute under appropriate circumstances.

We think, therefore, that the judgment should be modified to the extent that the Medical Examining Board is enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., only against Duane Larkin, M.D.

Dated at Madison, Wisconsin, this 10th day of July, 1974.

Respectfully submitted,
ROBERT W. WARREN
Attorney General of Wisconsin
/s/ *Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General of Wisconsin
Attorneys for Defendants

P.O. Address:
Room 14 East
State Capitol
Madison, Wisconsin
608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

Plaintiff,

vs.

HAROLD WITHROW, D.O., et al.,

Defendants.

ORDER

The parties have filed motions to modify certain language in the judgment of this three-judge court dated January 31, 1974. See Rule 62(c) Federal Rules of Civil Procedure. They agree that the judgment should be modified to provide that the defendant medical examining board be enjoined from utilizing the provisions of § 448.18 (7), Wis. Stats., only against the plaintiff, Duane Larkin, M.D.

In addition, the plaintiff requests that the modified judgment should recite specific grounds not previously included in the judgment but contained in the earlier memorandum decision of this court. See *Larkin* v. *Withrow*, ... F. Supp. ..... (E.D. Wis. No. 73-C-360, decided November 19, 1973). We conclude that the plaintiff's position is well taken. See *Schmidt* v. *Lessard*, 414 U.S. 473 (1974).

Therefore, IT IS ORDERED that the judgment of this court dated January 31, 1974, be and hereby is modified so that said judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

Dated at Milwaukee, Wisconsin, this 24th day of July, 1974.

/s/ *F. Ryan Duffy*
F. Ryan Duffy, U.S. Circuit Judge

/s/ *John W. Reynolds*
John W. Reynolds, U.S. District Judge

/s/ *Myron L. Gordon*
Myron L. Gordon, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

vs.

HAROLD WITHROW, D.O., et al.,

MODIFIED JUDGMENT

This action came on for (hearing) before the Court, Honorable F. Ryan Duffy, Senior Circuit Judge, John W. Reynolds, Chief District Judge, and Myron L. Gordon, District Judge, United States Judges presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the preliminary injunction and judgment dated January 31, 1974, be and hereby is modified, pursuant to Rule 62(c), Federal Rules of Civil Procedure, so that said judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on

the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

APPROVED:

F. Ryan Duffy
John W. Reynolds
Myron L. Gordon

Dated at Milwaukee, Wisconsin, this 25th day of July, 1974.

Ruth W. LaFave
Clerk of Court

Respectfully submitted,

ROBERT H. FRIEBERT
Attorney for Appellee

Of Counsel:
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